

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID L. ORTH)	
Claimant)	
VS.)	
)	Docket No. 1,061,431
BRITTAIN MACHINE, INC.)	
Respondent)	
AND)	
)	
INS. CO. OF STATE OF PENNSYLVANIA)	
Insurance Carrier)	

ORDER

Respondent requests review of the January 18, 2013, preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

APPEARANCES

Phillip B. Slape, of, Wichita, Kansas appeared for the claimant. Christopher J. McCurdy, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has adopted the stipulations and considered the same record as did the ALJ, including the transcript of the of preliminary hearing dated December 27, 2012, with attached exhibits, and the documents filed of record with the Division.

ISSUES

The Administrative Law Judge (ALJ) found that the claimant voluntarily gave a urine sample, and that the sample was taken within a reasonable time after the injury, under the circumstances. An affidavit presented to the court as Respondent's Exhibit 1, certifies that the lab involved was certified by the Kansas Department of Health and Environment. It does not appear that any split sample was obtained. The ALJ concluded the lack of a split sample renders the test results inadmissible, even though preliminarily, the other

obstacles to admissibility appear to be met. The ALJ held that even if the test is later ruled admissible, the claimant has met his burden to rebut the presumption that any impairment contributed to his injury. The ALJ opined that claimant "jumped off a flatbed in the ordinary course of his employment and there is no evidence that any intoxication contributed to his actions."¹

The respondent appeals, requesting review of whether the ALJ erred in refusing to deny the claimant preliminary benefits due to claimant's intoxication. Respondent argues that the Board should determine that even in the absence of the intoxication defense, claimant has failed to sustain his burden of proof to demonstrate personal injury by accident arising out of and in the course of his employment.

Claimant argues the Order should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed, although for other reasons.

Claimant worked for respondent as a gantry helper. His job duties involved driving a forklift and moving parts from one department to another. Claimant began working for respondent on May 29, 2012. His shift was 7:00 a.m. to 3:30 p.m., Monday through Friday.

On June 23, 2012, claimant was working overtime, delivering parts to vendors in a 22 foot long flatbed truck. Claimant was on the back of the truck checking his load, when he hopped down, injuring his right leg. When claimant landed on his right leg he heard a crunch and had some pain. Claimant continued to work the rest of his shift and continued to have pain in his right leg, with most of it being in his right knee.

Claimant reported his accident that day to his immediate supervisor, Jeff Hurst. Claimant did not work the next day. When he attempted to work on Monday, June 25, he was not able to finish his shift. Claimant reported to Mr. Hurst that his leg was hurting and he was allowed to go home at 9:00 a.m. Claimant was told to ice the knee. Claimant returned to work the next day (June 26) and again only worked two hours. Claimant returned to work again on June 27 and was unable to complete his shift. On June 28, claimant sought medical treatment after going into work and again complaining of pain in his leg.

Krystal Rohr, respondent's human resources manager, was contacted and an appointment was made for claimant with Kimberly Allman, M.D. A Via Christi Occupational & Environmental Medicine form completed by claimant on June 28, 2012, indicated a date

¹ ALJ Order at 2.

of accident on June 23, 2012, with the first symptoms beginning on June 26, 2012. The form indicates it was a work-related accident.

X-rays of claimant's right knee were taken, displaying a small joint effusion with mild degenerative changes in the patellofemoral joint. Claimant was given a cup to obtain a urine sample for a chemical screen, which he ultimately produced. The drug screen test was reported as positive for Carboxy-THC 221 ng/ml. When claimant returned to work Saturday, June 30, he was informed the results of the chemical screen were positive and he was told to go home. Claimant's employment was terminated on Monday, July 2, 2012.

Claimant currently complains of pain in his right leg, right knee, hip and low back. He is unable to stand for long and he has numbness and tingling going up and down his leg and in his right foot. Claimant admits to having pain in his hip before the accident, but the rest of the pain started at the time of the accident.

Claimant admits to smoking marijuana on June 27, 2012, at a friend's house. He denies smoking marijuana before the accident on June 23. Claimant denies being intoxicated on the day of the accident. No representative of respondent testified as to claimant's condition on June 23, 2012.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp 44-501b(c) states:

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp 44-501(b)(1)(A)(C)(D) states:

(b)(1)(A) The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including, but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens.

...
(C) It shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that, at the time of the injury, the employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above the levels shown on the following chart for the drugs of abuse listed:

	Confirmatory test cutoff levels (ng/ml)
Marijuana metabolite ¹	15
Cocaine metabolite ²	150
Opiates:	
Morphine.....	2000
Codeine.....	2000
6-Acetylmorphine ⁴	10 ng/ml
Phencyclidine.....	25
Amphetamines:	
Amphetamine.....	500
Methamphetamine ³	500

¹ Delta-9-tetrahydrocannabinol-9-carboxylic acid.

² Benzoyllecgonine.

³ Specimen must also contain amphetamine at a concentration greater than or equal to 200 ng/ml.

⁴ Test for 6-AM when morphine concentration exceeds 2,000 ng/ml.

(D) If it is shown that the employee was impaired pursuant to subsection (b)(1)(C) at the time of the injury, there shall be a rebuttable presumption that the accident, injury, disability or death was contributed to by such impairment. The employee may overcome the presumption of contribution by clear and convincing evidence.

K.S.A. 2011 Supp 44-501(b)(2)(3) states:

(2) The results of a chemical test shall be admissible evidence to prove impairment if the employer establishes that the testing was done under any of the following circumstances:

(A) As a result of an employer mandated drug testing policy, in place in writing prior to the date of accident or injury, requiring any worker to submit to testing for drugs or alcohol;

(B) during an autopsy or in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and not at the direction of the employer;

(C) the worker, prior to the date and time of the accident or injury, gave written consent to the employer that the worker would voluntarily submit to a chemical test for drugs or alcohol following any accident or injury;

(D) the worker voluntarily agrees to submit to a chemical test for drugs or alcohol following any accident or injury; or

(E) as a result of federal or state law or a federal or state rule or regulation having the force and effect of law requiring a post-injury testing program and such required program was properly implemented at the time of testing.

(3) Notwithstanding subsection (b)(2), the results of a chemical test performed on a sample collected by an employer shall not be admissible evidence to prove impairment unless the following conditions are met:

(A) The test sample was collected within a reasonable time following the accident or injury;

(B) the collecting and labeling of the test sample was performed by or under the supervision of a licensed health care professional;

(C) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;

(D) the test was confirmed by gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample;

(E) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee; and

(F) a split sample sufficient for testing shall be retained and made available to the employee within 48 hours of a positive test.

The ALJ ruled that the collection of claimant's urine sample was reasonably timely. This Board Member disagrees. The test was not performed until 5 days after the accident. Claimant testified that he reported the accident to his supervisor on the day it happened. Additionally, claimant, daily, told his supervisor, Jeff Hurst, that he was having pain from the accident and he was unable to complete his work, going home early several times. While it is true that claimant did not request medical treatment, it is equally true no medical treatment was offered for several days.

Claimant does not deny smoking marijuana with friends on June 27. He denies smoking or being intoxicated prior to the accident on June 23, 2012. There is no evidence to contradict claimant's testimony.

Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.²

The purpose of drug testing, as prescribed by K.S.A. 2011 Supp. 44-501(b) is to determine, **at the time of an accident or injury**, whether the worker was impaired by drugs or alcohol. Therefore, it is imperative that the sample used for the drug testing be obtained from the injured worker within a reasonable time after the accident or injury. The Board ruled, in *Martin*,³ that a urine sample obtained 3 days after the accident was not obtained within a reasonable time. Here, the test was not obtained for 5 days, even though claimant's supervisor was advised for several days that claimant had suffered a work accident and injury, and was in sufficient pain to render him incapable of completing a full day of work. It is significant that, almost immediately upon claimant being referred for medical treatment, a sample was obtained. Had claimant been provided immediate medical care, a sample could have been collected just as promptly.

² *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

³ *Martin v. Staffpoint*, No. 1,058,718, 2012 WL 6811291 (Kan. WCAB Dec. 21, 2012).

Without the drug test results, this record is devoid of evidence to show claimant was impaired on the date of accident. The Order of the ALJ, granting claimant preliminary benefits, is affirmed, although on other grounds.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

The drug test performed on claimant was not obtained within a reasonable time after the accident. Therefore, the results are inadmissible. The Order of the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated January 18, 2013, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2013.

HONORABLE GARY M. KORTE
BOARD MEMBER

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Thomas Klein, Administrative Law Judge

⁴ K.S.A. 2011 Supp. 44-534a.